STATE OF MICHIGAN

COURT OF APPEALS

HELEN C. NAVA,

Plaintiff-Appellant,

v

DAVID C. EASON, LINDA NICKERSON and LUMBERMENS MUTUAL CASUALTY COMPANY,

Defendants-Appellees.

UNPUBLISHED
February 28, 2003

No. 238485
Wayne Circuit Court
LC No. 00-012559-CZ

Before: Kelly, P.J., and White and Hoekstra, JJ.

PER CURIAM.

In this age discrimination case, plaintiff appeals as of right the circuit court's grant of defendants' motion for summary disposition pursuant to MCR 2.116(C)(10). We reverse. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

This claim involves alleged age discrimination surrounding a nervous breakdown suffered by plaintiff in December 1998, and her ultimate termination as a legal secretary for defendant Lumbermens Mutual Casualty Company, her employer since 1981. Plaintiff's performance evaluations before 1998 generally were highly rated, with the exception of a 1996 incident when a verbal altercation occurred. In 1998, plaintiff and the other office secretaries were placed in a pool arrangement and a new word processing system was installed. At that point, disputes arose between plaintiff and Linda Nickerson, her direct supervisor, regarding the quality and amount of plaintiff's work compared to the other secretaries. Plaintiff's performance evaluation was lowered, she was made to provide daily memos to Nickerson about her work, and her work duties were modified. On December 9, 1998, plaintiff was informed by David Eason, managing partner of the office, that she would either have to resume her previous duties or take a 10% reduction in pay. Plaintiff had a panic attack and was taken to a hospital. She did not return to her employment after that date. Defendants eventually terminated plaintiff's employment on August 21, 2001, when her long term disability benefits were terminated.

Plaintiff filed suit alleging a violation of the Civil Rights Act, MCL 37.2101, *et seq*., maintaining that the various disciplinary actions leading to her mental condition and eventual termination were unjustified and were due to Nickerson's and Eason's age-related animus toward her. Defendants moved for summary disposition pursuant to MCR 2.116(C)(10), claiming that plaintiff provided no direct evidence of discrimination. They also maintained that plaintiff had

not established a prima facie case of discrimination based upon circumstantial evidence because she (1) did not suffer an adverse employment action, (2) was not qualified for the position of legal secretary at the time she decided to leave her employment, (3) was not treated differently than other employees or replaced by a younger employee, and (4) could not prove damages because any discrimination was not the proximate cause of her inability to return to work.

The circuit court concluded that comments made by Nickerson regarding plaintiff's job security could be interpreted by a jury to mean that Nickerson had animus against plaintiff based in whole or in part on age. It also found that the time frame between the comments and the lowering of plaintiff's performance rating in 1998 was short. The court evaluated Nickerson's comments in a framework of whether plaintiff was treated differently from other employees and thus whether plaintiff could present a prima facie case of discrimination. The court found that plaintiff did not present evidence that she was treated differently from the other secretaries. The court also found that plaintiff could not show that she was qualified to perform the work required of a legal secretary due to her lack of computer skills.

Plaintiff's sole question on appeal is whether she presented sufficient direct evidence of age discrimination to survive defendants' motion for summary disposition. In support of her claim she references her deposition testimony concerning statements made by Nickerson and Eason. Plaintiff maintains that the circuit court properly found that these comments were direct evidence of discriminatory animus, yet then erroneously applied the wrong legal standard by evaluating the comments under the prima facie test of discrimination, which is used when a plaintiff does not present direct evidence of discrimination. We agree.

The trial court's grant of summary disposition is reviewed de novo. *Smith v Globe Life Ins Co*, 460 Mich 446, 454-455; 597 NW2d 28 (1999). Summary disposition is proper pursuant to MCR 2.116(C)(10) when "[e]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." See *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). The deciding court must look at all the evidence, affidavits, pleadings, admissions, and other information available in the record in the light most favorable to the nonmoving party, who must be given the benefit of every reasonable doubt. MCR 2.116(G)(5); *Smith, supra*, 460 Mich 454; *Atlas Valley Golf & Country Club, Inc v Village of Goodrich*, 227 Mich App 14, 25; 575 NW2d 56 (1998).

The Civil Rights Act prohibits an employer from discriminating against an applicant because of age. MCL 37.2202(1)(a). Direct evidence of discrimination is "evidence which, if believed, requires the conclusion that unlawful discrimination was at least a motivating factor in the employer's actions." *Hazle v Ford Motor Co*, 464 Mich 456, 462; 628 NW2d 515 (2001), citing *Jacklyn v Schering-Plough Healthcare Products Sales Corp*, 176 F 3d 921, 926 (CA 6, 1999), and *Harrison v Olde Financial Corp*, 225 Mich App 601, 610; 572 NW2d 679 (1997). "Thus, racial slurs by a decision maker constitute direct evidence of racial discrimination that is sufficient to get the plaintiff's case to a jury." *Downey v Charlevoix Co Bd of Co Rd Comm'rs*, 227 Mich App 621, 633; 576 NW2d 712 (1998); see also *Lamoria v Health Care & Retirement Corp*, 230 Mich App 801, 810-811; 584 NW2d 589 (1998), adopted 233 Mich App 560; 593 NW2d 699 (1999) (hospital administrator's remarks about "getting rid of older employees" constitutes direct evidence of age-based animus). When a plaintiff presents direct evidence of

discrimination, the case proceeds as an ordinary civil case, i.e., the plaintiff must prove unlawful discrimination as the plaintiff would prove any other civil case. *Hazle, supra* at 462.

Absent evidence of direct discrimination, a plaintiff claiming age discrimination must proceed under the shifting burdens of proof of *McDonnell Douglas Corp v Green*, 411 US 792, 804-805; 93 S Ct 1817; 36 L Ed 2d 668 (1973); *Hazle, supra* at 463-464. Under this test, the plaintiff must first prove a prima facie case of discrimination by a preponderance of the evidence by showing, in general terms, that (1) he was a member of a protected class, (2) he suffered an adverse employment action, (3) he was qualified for the position, and (4) that the adverse employment action occurred under circumstances giving rise to an inference of discrimination. *Hazle, supra* at 463.

The prima facie test applies only to discrimination claims "based solely on indirect or circumstantial evidence of discrimination." *DeBrow v Century 21 Great Lakes, Inc (After Remand)*, 463 Mich 534, 538-539; 620 NW2d 836 (2001); see also *Downey, supra* at 633. If a plaintiff presents direct evidence of discrimination—for example a derogatory comment by an individual's employer made to the employee that directly relates to age—summary disposition is precluded even if the comment may be subject to more than one interpretation. *DeBrow, supra* at 538-539.

Plaintiff presented direct evidence of age discrimination. Plaintiff testified that Nickerson repeatedly told her, among other comments, that she was the oldest, highest paid secretary and just because she had more seniority did not mean they would not get rid of her. Comments such as these were repeated on a regular basis from late 1996 until December 1998. The circuit court correctly found that these statements could be interpreted as evidencing discriminatory animus based on age on Nickerson's part. [1]

The comments were not "stray remarks," as defendants argue, but rather were repeated and made closely in time to both the poor performance evaluation and the later decision to provide plaintiff with the choice between a pay reduction or a work increase. Also, while Eason rather than Nickerson took the final adverse employment action against plaintiff in December 1998, Nickerson's position as plaintiff's supervisor and Nickerson's own testimony that she participated in the decision to discipline plaintiff support a finding that the remarks were relevant as a measure of discriminatory animus. *Krohn v Sedgwick James of Michigan, Inc*, 244 Mich App 289, 292-300; 624 NW2d 212 (2001); see also *Wells v New Cherokee Corp*, 58 F3d 233, 237-238 (CA 6, 1995).

Plaintiff also alleged that she overheard comments made by Eason that directly support her claim of age discrimination. Plaintiff claimed that, on a number of occasions from 1993 to

[1] Additionally, plaintiff testified that Nickerson told two other secretaries, Kathy Alstrom and Cheryl Benson, "not to pay attention to anything I did because it was probably menopausal". However, this comment was made out of plaintiff's presence and was related to her by Benson. The record does not contain deposition testimony from Benson. Thus this inadmissible hearsay statement cannot be used to oppose defendants' summary disposition motion. *Maiden v Rozwood*, 461 Mich 109, 121; 597 NW2d 817 (1999). In addition, this statement was made in 1992, and is thus not directly related to the adverse employment actions in 1998.

1998, he made repeated remarks about the young women with whom he had relationships. Plaintiff also maintained that she overheard Eason telling others on a number of occasions that "after women reach a certain age,… they're of no use." Eason also allegedly made a comment similar to "chalk it up to menopause" at some time between 1993 and 1998. These statements, while perhaps properly characterized as stray remarks, could be interpreted by a fact-finder as evidence that Eason shared Nickerson's age-related animus. *Downey, supra,* 227 Mich App 633.

Taken in a light most favorable to plaintiff, the statements by Nickerson are direct evidence of age animus—evidence that, if believed, requires a conclusion that unlawful discrimination was at least a motivating factor in the adverse employment action. *Hazle, supra,* 464 Mich 462; *Debrow, supra,* 463 Mich 540; *Downey, supra,* 227 Mich App 633. Thus, plaintiff's age discrimination claim was a matter for the trier of fact to decide. The circuit court erred in granting defendants' motion for summary disposition.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Kirsten Frank Kelly
/s/ Helene N. White
/s/ Joel P. Hoekstra